(9)

No. 95-1081

In the Supreme Court of the United States

OCTOBER TERM, 1995

INGALLS SHIPBUILDING, INC., ET AL.,
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

WALTER DELLINGER
Acting Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

J. DAVITT MCATEER
Acting Solicitor of Labor
ALLEN H. FELDMAN
Deputy Solicitor General
EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

65 pp

QUESTIONS PRESENTED

1. Whether Section 33(g)(1) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 933(g)(1), which requires a "person entitled to compensation" under the Act to obtain an employer's prior written approval of certain settlements with a third party who may be liable for a work-related injury, applies to an injured employee's relative who settles a potential wrongful death action while the employee is alive.

2. Whether the Secretary of Labor's delegate, the Director of the Office of Workers' Compensation Programs, is entitled to participate as a party respondent in the court of appeals when a private party seeks review of a decision of the Department of Labor's Benefits Review Board.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulations, and rules:

Statutes, regulations, and rules—Continued: Page

Statutes, regulations, and rules—Continued: Page

Statutes, regulations, and rules—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1081

INGALLS SHIPBUILDING, INC., ET AL.,
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 65 F.3d 460. The decision and order of the Benefits Review Board (Pet. App. 20-55) are reported at 28 Ben. Rev. Bd. Serv. (MB) 137, and the decision and order of the administrative law judge (Pet. App. 56-88) are reported at 26 Ben. Rev. Bd. Serv. (MB) 174.

JURISDICTION

The court of appeals entered its judgment on October 3, 1995, and denied a suggestion of rehearing en banc that it treated as a petition for rehearing (Pet. App. 18-19) on November 22, 1995. 71 F.3d 880. The petition for a writ of

certiorari was filed on January 2, 1996. On May 13, 1996, the Court granted review, limited to Questions 1 and 2 presented by the petition. 116 S. Ct. 1671. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 933(g), provides in relevant part:

> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person * * * for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation * * * only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed * * *.
>
> (2) If no written approval of the settlement is obtained and filed * * * all rights to compensation and medical benefits under this chapter shall be terminated * * *.

Other pertinent provisions of Section 33 of the LHWCA (33 U.S.C. 933) are reprinted in the Appendix., *infra*, 1a-5a.

STATEMENT

A. The Statutory Framework

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, creates a comprehensive federal scheme to compensate maritime workers who are disabled, and the surviving relatives of maritime workers who are killed, due to injuries incurred

while a maritime worker is employed upon the navigable waters of the United States. Maritime employers are liable for payment of such compensation, 33 U.S.C. 904(a), for covered injuries without regard to fault for the disability or death, and have certain duties to furnish medical services in connection with injuries. 33 U.S.C. 904, 906-909. Payments to compensate for an employee's disability are paid to the employee according to a statutory scheme based on the extent of the employee's disability or the type of injury. 33 U.S.C. 908. If the injury causes the employee's death, the compensation is paid to, or for the benefit of, certain surviving relatives of the employee. 33 U.S.C. 909. In exchange for that statutory liability, the Act provides that, so long as the employer has secured its obligations under the Act, including payment of statutory benefits, 33 U.S.C. 904(a), 932(a), the liability that the Act imposes is "exclusive and in place of all other liability of such employer" to the employee, his or her relatives, and anyone otherwise entitled to recover damages from such employer on account of the employee's injury or death. 33 U.S.C. 905(a); see also 33 U.S.C. 933(i).

The LHWCA provides that, "[e]xcept as otherwise specifically provided," the Secretary of Labor "shall administer the provisions" of the Act. 33 U.S.C. 939(a). For that purpose, the Secretary is authorized to make such rules and regulations, appoint such officers and employees, and make such expenditures as may be necessary. *Ibid.* The Act also provides for the Secretary to establish compensation districts and to assign persons to the districts, as the Secretary "deems advisable," to perform much of the day-to-day administration of the Act under the authority of the Secretary. See 33 U.S.C. 939(b), 940. Although the Act refers to those persons as "deputy commissioner[s]" (*e.g.*, 33 U.S.C. 913(a)), the Secretary uses the title "district director" to refer to the persons performing the ad-

ministrative duties of deputy commissioners. See 20 C.F.R. 701.301(a)(7), 702.105. Finally, the Act establishes the Benefits Review Board, composed of members appointed by the Secretary of Labor, and provides that the Secretary shall designate a chairman of the Board to have the authority, "as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board." 33 U.S.C. 921(b)(1). Board members are subject to removal by the Secretary at his discretion. *Kalaris* v. *Donovan*, 697 F.2d 376, 389-397 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983); see Pet. Br. 31.

Pursuant to his statutory authority to administer the Act, including the specific authority to make rules and regulations and to appoint officers and employees, 33 U.S.C. 939(a), the Secretary established the Office of Workers' Compensation Programs (OWCP). The Secretary delegated his responsibility for administration of the benefits program under the LHWCA to the Director of the OWCP (Director). See 20 C.F.R. 701.201-701.203.[1]

---

[1] The statutory language speaks in terms of duties imposed on the Secretary. In light of the Secretary's delegation of his responsibilities under the LHWCA to the Director, however, we refer throughout this brief to the Director rather than the Secretary as the bearer of the statutory duties.

In addition to administering the LHWCA benefits program, the Director is responsible for administering the benefits programs under the Defense Base Act, 42 U.S.C. 1651 *et seq.*, the former District of Columbia Workmen's Compensation Act, D.C. Code Ann. § 36.501 *et seq.* (1973), the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, Subchapter II of the Federal Employees Compensation Act (Nonappropriated Fund Instrumentalities Act), 5 U.S.C. 8171 *et seq.*, and Title IV of the Federal Coal Mine Health and Safety Act of 1969, (known as the Black Lung Benefits Act (BLBA)), 30 U.S.C. 901 *et seq.* See 20 C.F.R. 701.202(b)-(f). The first four of those Acts are direct extensions of the LHWCA, and the same regulations generally govern the administration of the programs under those Acts, with a few exceptions. See 20 C.F.R. 701.101, 701.102. The regulations governing administration of the BLBA are set forth immediately following the LHWCA regulations. See 20 C.F.R. Pt. 718.

Employees or surviving relatives seeking compensation under the LHWCA generally must notify the employer and may file a claim with a district director of OWCP. 33 U.S.C. 912, 913(a). Compensation is to be paid promptly by the employer to "the person entitled thereto," without issuance of a formal compensation award, except where liability is contraverted by the employer. 33 U.S.C. 914(a). A district director may, upon his own initiative and at any time, investigate a case in which payments are being made without an award. 33 U.S.C 914(h)(1), 919(c). If a dispute regarding a claim arises, a district director must conduct an investigation and "take such further action as he considers will properly protect the rights of all parties." 33 U.S.C. 914(h)(2). District directors have authority to make compensation awards. 33 U.S.C. 919(a).

If a district director is unable to resolve a claim informally, the claim is forwarded to an administrative law judge (ALJ). 33 U.S.C. 919(d). ALJs are empowered to conduct formal hearings in compliance with 5 U.S.C. 554, and to prepare compensation orders for filing with the district directors. 33 U.S.C. 919(c), (d) and (e); 20 C.F.R. 702.301-702.317, 702.331-702.351. Implementing regulations provide that the claimant and the employer (or its insurance carrier) are necessary parties to a hearing before an ALJ. 20 C.F.R. 702.333(a). The Director, represented by the Solicitor of Labor or his designee, is an interested party who may participate in ALJ hearings. 20 C.F.R. 702.333(b).

Appeals raising a substantial question of law or fact may be taken to the Benefits Review Board "by any party in interest" from ALJ decisions with respect to

benefit and compensation claims under the Act. 33 U.S.C. 921(b)(3); 20 C.F.R. 702.391, 801.102. The terms "party" and "party in interest" are defined to mean "the Secretary or his designee and any person or business entity directly affected by the decision or order from which an appeal to the Board is taken." 20 C.F.R. 801.2(a)(10). The Board reviews an ALJ's decision to determine if it is supported by substantial evidence and is in accordance with law. 33 U.S.C. 921(b)(3); 20 C.F.R. 801.102.

Under Section 21(c) of the Act, "[a]ny person adversely affected or aggrieved by a final order of the Board may obtain a review of that order" in the court of appeals. "Attorneys appointed by the Secretary"—*i.e.* attorneys from the Department of Labor's Office of the Solicitor—represent "the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921." 33 U.S.C. 921(a). The Secretary has designated the Director "to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c)," and attorneys from the Office of the Solicitor therefore represent the Director in the courts of appeals. 20 C.F.R. 802.410(b).[2]

The Director does not have standing under the Act to seek judicial review of a Board ruling based on the Director's general areas of responsibility under the Act. *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278 (1995). The Director may, however, have standing to seek review in circumstances in which the Board's ruling interferes with a specific statu-

[2] If an employer fails to comply with a final compensation order making an award, enforcement of the award must be obtained in a federal district court. 33 U.S.C. 921(d). An application for such enforcement may be made by any beneficiary of the award or the district director who filed the award. *Ibid.*

tory duty of the Director, such as his duties in administering the special statutory fund established by Section 44(a) of the Act, 33 U.S.C. 944(a), that assumes liability for compensation payments in particular cases under Section 8(f) of the Act, 33 U.S.C. 908(f). See *Newport News*, 115 S. Ct. at 1282 n.1 (reserving question).[3]

2. Section 33 of the Act, 33 U.S.C. 933, addresses the subject of compensation where third parties are liable in damages for the injury sustained. Subsection (a) of Section 33 specifies that, if a "person entitled to * * * compensation" under the Act determines that a third party, *i.e.*, "some person other than the employer or a person or persons in his employ," is liable in damages, the person need not elect whether to receive compensation under the Act or to recover damages against such third party. 33 U.S.C. 933(a). If the person accepts LHWCA compensation from an employer under a formal compensation order, however, the person must commence his or her own action against the third party within six months of acceptance of the award; otherwise, the person's rights against the third party are assigned to the employer. 33 U.S.C. 933(b). If the rights are thus assigned to the employer, but the employer does not commence an action against the third party within 90 days of that assignment, the right to bring suit reverts to the person entitled to compensation. *Ibid.*

Pursuant to Section 33(f) of the Act, "[i]f the person entitled to compensation institutes proceedings within the period prescribed in [Section 33(b)] the employer shall be required to pay as compensation under the [LHWCA] a sum equal to the excess of the amount which the Secre-

[3] If the Director concludes that a decision of the Board established an erroneous rule of law, the Director can alter that rule by issuing a regulation pursuant to his delegated authority under 33 U.S.C. 939(a). *Newport News*, 115 S. Ct. at 1287.

tary determines is payable on account of such injury or death over the net amount recovered" against such third party. 33 U.S.C. 933(f). If a "person entitled to compensation" enters into a settlement with a third party for an amount less than the compensation to which the person would be entitled under the LHWCA, the employer "shall be liable for compensation as determined under subsection (f) * * * only if written approval of the settlement is obtained from the employer, and the employer's carrier, before the settlement is executed." 33 U.S.C. 933(g)(1).

B. The Circumstances Of This Case

1. Respondent Maggie Yates is the widow of Jefferson Yates, a former employee of petitioner Ingalls Shipbuilding, Inc.[4] Mr. Yates was a pipefitter who was exposed to asbestos during his employment with petitioner. In April 1981, Mr. Yates filed a claim for LHWCA disability benefits under Section 8 of the Act, 33 U.S.C. 908. In 1982, petitioner admitted compensability of Mr. Yates' claim for disability benefits. In May 1983, petitioner and Mr. Yates entered into a settlement, approved by the district director pursuant to 33 U.S.C. 908(i), in which petitioner agreed to pay Mr. Yates a lump sum of $15,000 and to provide him medical benefits and payment of his attorney's fees. Pet. App. 2.

Meanwhile, in May 1981, Mr. Yates had filed a lawsuit against third parties (23 manufacturers and sellers of asbestos) seeking damages for his injuries that arose out of his exposure to the third parties' asbestos products

---

[4] Petitioner American Mutual Liability Insurance Company was the workers' compensation carrier for petitioner Ingalls, but is now in receivership. Pet. 2 n.2. Petitioner Mississippi Insurance Guaranty Association has assumed its obligations for payment of benefits under the LHWCA. *Ibid*. All further references to "petitioner" are to petitioner Ingalls, unless otherwise specified.

while he was employed by petitioner. Over time, Mr. Yates entered into partial settlements with several of the defendants in the third-party suit. Pet. App. 62-63. Respondent Maggie Yates was not a party to Mr. Yates' suit for damages but, as a condition of her husband's settlement with some of the defendants, she released her potential claims against various defendants, including in some instances her potential wrongful death claims. *Id.* at 3. Petitioner also was not a party to Mr. Yates' third-party suit, and it did not provide its approval of the settlements. None of the settlements attempted to foreclose petitioner from bringing its own third-party action. *Id.* at 63.

Mr. Yates died in January 1986 from prostate cancer. The parties stipulated that he had asbestosis that contributed to his death. Pet. App. 3. In April 1986, respondent Maggie Yates filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. 909, as Mr. Yates' widow. Mr. Yates' six adult children were not entitled to compensation under the LHWCA because they were not dependent on him, and they therefore did not file any LHWCA claims. Pet. App. 3; see 33 U.S.C. 909(b) (providing death benefits for surviving child or children); 33 U.S.C. 902(14) (non-dependent adult is not a "child").

Respondent Yates and her children pursued Mr. Yates' third-party lawsuit against the defendants who had not yet settled. That suit was converted to a wrongful death action. Pet. App. 3. Respondent Yates and her children entered into three settlements with third-party defendants totalling $105,821.00 ($63,680.67 net of attorney's fees and expenses). *Id.* at 3, 23. Respondent Yates, now a person entitled to compensation under the LHWCA by virtue of her status as the widow of Mr. Yates, obtained petitioner's prior written approval of those settlements in accord with Section 33(g)(1) of the LHWCA, 33 U.S.C. 933(g)(1). Pet. App. 3, 23, 64.

2. Petitioner controverted respondent Yates' claim for death benefits under the LHWCA, and the matter was referred to an ALJ for a hearing. Pet. App. 58. Petitioner admitted the compensability of respondent Yates' claim, but contended that the claim was barred by Section 33(g)(1) of the LHWCA because petitioner's prior approval had not been obtained for the pre-death settlements with certain of the third-party defendants. See Pet. App. 64-65.

The ALJ rejected petitioner's argument and held that Section 33(g)(1) did not bar respondent Yates' claim. The ALJ reasoned that respondent was not yet a "person entitled to compensation" for purposes of Section 33(g) when she joined the third-party settlements prior to Mr. Yates' death, and therefore was not subject to the requirement in Section 33(g) that the employer give its prior approval to the settlement. The ALJ ruled that potential widows are not "persons entitled to compensation" because, unlike an injured employee, the spouse of an injured employee has no cause of action for LHWCA benefits unless and until the injured employee dies, and, even then, only if the death results in part from a work-related injury. Pet. App. 68. The ALJ pointed out that, until her husband died, respondent Yates could not have known that his job-related disability would cause or contribute to his death, or that she would survive him and still be his wife at the time of death. *Ibid.* The ALJ concluded that Congress's intent was clear in Section 9 of the LHWCA, 33 U.S.C. 909, that a cause of action for death benefits does not arise until the death of the injured employee, and that respondent Yates could not have been deemed a "person entitled to compensation" until her husband died due to a work-related injury. Thus, the failure to obtain petitioner's prior approval of the pre-death settlements could not bar respondent's claim. Pet. App. 70-71.[5]

3. The Benefits Review Board affirmed in relevant respects, ruling that Section 33(g)(1) does not bar respondent Yates' claim. Pet. App. 30-37. The Board pointed out that, in *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475-479 (1992), decided after the ALJ's decision, this Court held that an injured employee becomes subject to Section 33(g)(1)'s written-approval requirement as a "person entitled to compensation" when his right to recover vests. Pet. App. 30-31 (citing *Cowart*, 505 U.S. at 475-479).[6] Here, the Board ruled that the right of a potential widow to receive death benefits does not vest until her husband dies as a result of a work-related injury. It noted that numerous intervening events could affect her rights, including divorce, the employee's death due to a non-work-related ailment, the widow's predeceasing the employee, or

---

[5] The ALJ also ruled that, under Section 33(f) of the Act, 33 U.S.C. 933(f), petitioner could offset its LHWCA liabilities to respondent Yates by the total amount of the net proceeds from the post-death settlements, including amounts paid to Yates' six surviving children. Pet. App. 84-86. The Benefits Review Board reversed that ruling, however, and held that petitioner's offset was limited to the net recovery attributable to respondent Yates. *Id.* at 42-44. The court of appeals affirmed. *Id.* at 12-16. In Questions 3 and 4 presented in its petition for a writ of certiorari, petitioner sought review of certain issues related to the offset, but this Court limited its grant of certiorari to Questions 1 and 2 presented by the petition. 116 S. Ct. 1671. Accordingly, we do not address the offset for the post-death settlements. We also do not address various other issues on which petitioner did not seek review, including the ALJ's award of funeral expenses under Section 9(a) of the LHWCA and of attorney's fees to respondent Yates' lawyer. See Pet. App. 72-82, 87.

[6] The Director participated as an interested party before the Board, see 20 C.F.R. 801.2(a)(10), 801.102(a), by responding to petitioner's appeal to the Board. Pet. App. 27.

a change in the law. Pet. App. 35. The Board therefore concluded that, because respondent had no vested right to death benefits before her husband died, she became a "person entitled to compensation" only upon the death of her husband, and therefore was not subject to Section 33(g)(1)'s written-approval requirement when she signed the pre-death settlements. Pet. App. 31-37.[7]

4. The court of appeals affirmed. Pet. App. 1-17. Like the Board, it read *Cowart* to hold that a "person entitled to compensation" means a person whose right to compensation has vested. *Id.* at 8-9. The Court then held that, under *Cowart*, respondent Yates was not a "person entitled to compensation" at the time of the pre-death settlements because her right to recover death benefits did not vest until her husband's death. *Id.* at 10. The court pointed out instances in which no right to death benefits under the Act would ever have accrued for respondent Yates, citing, for example, the fact that she could have predeceased her husband, she could have divorced him, or he could have died from causes unrelated to his employment. *Ibid.* Because respondent Yates' right to benefits had not vested when she entered into the pre-death settlements, the court concluded that her failure to obtain petitioner's prior written approval of those settlements under Section 33(g)(1) did not bar her subsequent claim for benefits. Pet. App. 10-11. The court of appeals expressly

[7] Administrative Appeals Judge Brown filed a concurring opinion in which he agreed with the opinion for the Board and further reasoned that Section 33(g)(1) does not bar respondent Yates' claim because her pre-death settlements were for an amount greater than the amount to which Mr. Yates would have been entitled under the Act. Pet. App. 45, 48-49. Administrative Appeals Judge Smith also filed a separate opinion in which he concurred on the Section 33(g)(1) issue, but dissented on an offset question that is no longer at issue. Pet. App. 52-55; see note 5, *supra*.

disagreed with the Ninth Circuit's contrary ruling in *Cretan* v. *Bethlehem Steel Corp.*, 1 F.3d 843 (1993), cert. denied, 114 S. Ct. 2705 (1994), which dismissed this Court's reasoning in *Cowart* as *dicta*. Pet. App. 9-10.

In a footnote, the court of appeals also rejected petitioner's argument that the Director lacked standing to participate as a party respondent in the court of appeals. Pet. App. 6 n.2. That argument was foreclosed, the court ruled, by its ruling in a prior case that the Director is a proper respondent on review of a Board decision. *Ibid.* (citing *Ingalls Shipbuilding Div., Litton Systems, Inc.* v. *White*, 681 F.2d 275, 281-284 (5th Cir. 1982), overruled on other grounds, *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399, 406-407 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984)). The court recognized that in *Newport News*, 115 S. Ct. at 1284 n.2, this Court held that the Director did not have standing to petition the court of appeals for review of the Board decision at issue in that case. But the court below pointed out that the *Newport News* Court expressly "differentiated an agency's entitlement to party-respondent status from its standing to appeal," and "intimate[d] no view on the party-respondent question." Pet. App. 6 n.2 (quoting *ibid.*).

SUMMARY OF ARGUMENT

I. Section 33(g)(1) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 933(g)(1), provides that a "person entitled to compensation" under the Act must obtain prior written approval from the employer before settling a third-party claim for an amount less than the compensation to which the person would be entitled under the Act. Otherwise, the person's rights to compensation under the Act are terminated. That requirement does not, however, apply to persons like respondent Yates who are not entitled to compensation

under the Act at the time of the settlement. Under *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469 (1992), a "person entitled to compensation" means a person who already satisfies the prerequisites for entitlement and has a vested right to recover compensation under the Act. Respondent Yates was not "entitled" to (*i.e.*, had no vested right to) death benefits under the LHWCA at the time she released her potential wrongful death claims against third parties, because her husband had not yet died.

Petitioner attempts to avoid that natural reading of the plain language of Section 33(g)(1) by ignoring the import of the phrase "person entitled to compensation," which clearly identifies to whom Section 33(g)(1) applies. Petitioner instead focuses on the phrase later in Section 33(g)(1) that provides that the only settlements by such persons that are subject to Section 33(g)(1) are those "for an amount less than the compensation to which the person (or the person's representative) would be entitled under" the LHWCA. Petitioner removes the latter phrase from its context and claims that Section 33(g)(1) is applicable to all persons "who '*would be* entitled to compensation' under the LHWCA" in the future. Pet. Br. 7; see also *id.* at 8, 15-16, 20, 28 (emphasis added). Petitioner's interpretation is inconsistent with the statutory text and the Court's reasoning in *Cowart*.

The Court should reject petitioner's contention that it apply a different interpretation to Section 33(g)(1) in this case than it did in *Cowart* in order to further general policies underlying the Act. Petitioner's policy argument is rooted in its view of Section 33(g)(1) as protection for employers against imprudent settlements by claimants, and as a bar against double recoveries to claimants. The underlying premise of petitioner's argument is that, if a person like respondent Yates is not a "person entitled to compensation" under Section 33(g)(1), then the person also

is not covered by the offset provision of Section 33(f), which also applies only to "persons entitled to compensation." Interpreting the phrase in the same manner in the two sections means that an employer would not be entitled to a credit against settlements in cases such as this. Pet. Br. 9, 23-24.

In light of the reasoning of *Cowart*, it appears that petitioner is correct that the phrase "person entitled to compensation" must be interpreted in the same manner in both Section 33(f) and Section 33(g)(1). See *Cowart*, 505 U.S. at 479. Thus, Section 33(f) would permit an employer credit against its statutory liability to a person for a third-party recovery by that person only if the person was entitled to compensation at the time of the recovery, having instituted a proceeding against a third party within six months of acceptance of a compensation award. See 33 U.S.C. 933(f) and (b). Assuming that to be the case, however, the statutory scheme is not thereby rendered irrational. There is no categorical ban against overcompensation or double recovery and, in other circumstances, the LHWCA itself has been interpreted not to prevent certain collateral recoveries.

II. The Secretary of Labor's delegate, the Director of the Office of Workers' Compensation Programs (Director), is entitled to participate as a party respondent in court of appeals' proceedings when a private party seeks review of a decision of the Department of Labor's Benefits Review Board under Section 21(c) of the Act, 33 U.S.C. 921(c). Federal Rule of Appellate Procedure 15(a) requires that a federal agency be named as a respondent in all cases seeking review of agency orders. The Secretary of Labor has reasonably delegated his authority to the Director to represent the agency as a respondent under Rule 15(a). The Director is the person charged with administering and enforcing the LHWCA, and is the official whose inter-

pretation of the Act is entitled to deference. The Director therefore is the proper administrative official to be named and participate as a party in litigation challenging adjudicatory decisions under the Act.

ARGUMENT

I. THE REQUIREMENT IN SECTION 33(g)(1) OF THE LHWCA TO OBTAIN PRIOR APPROVAL FROM THE EMPLOYER BEFORE SETTLING A THIRD-PARTY CLAIM DOES NOT APPLY TO PERSONS, LIKE RESPONDENT YATES, WHO ARE NOT ENTITLED TO COMPENSATION UNDER THE ACT AT THE TIME OF THE THIRD-PARTY SETTLEMENT

Petitioner does not dispute that respondent Maggie Yates was the wife of its former employee, decedent Jefferson Yates, at the time of his death due to an injury sustained while he was employed by petitioner. Petitioner therefore does not dispute that respondent Yates meets the eligibility requirements for death benefits as a surviving widow under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. 901 *et seq*. See 33 U.S.C. 902(16), 909. Petitioner contends, however, that all of respondent Yates' rights to compensation under the LHWCA were terminated under Section 33(g)(1) of the Act, 33 U.S.C. 933(g)(1), because she did not obtain written approval from her husband's employer before she signed settlement agreements regarding her potential wrongful death causes of action against certain third parties due to the third parties' liability for injuries to her husband. See Pet. Br. 7-9, 11-28.

Contrary to petitioner's contention, Section 33(g)(1) did not apply to respondent Yates when she entered into those settlements, because her husband was still alive. Section 33(g)(1) applies only to persons who are "entitled to compensation" under the Act at the time they enter into a

settlement. Respondent Yates was not entitled to compensation under the Act at the time of the pre-death settlements because any entitlement to death benefits under the LHWCA vests only after the death of the covered employee.

Petitioner attempts to avoid this straightforward conclusion by urging the Court to construe Section 33(g)(1) in a manner that is contrary to the normal, natural meaning of its text and that is inconsistent with this Court's interpretation of that provision in *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469 (1992). Petitioner asserts that the Court should depart from the plain language of the Act in order to further the general policy goal of protecting employers by ensuring that they reduce their statutory liability by obtaining credit for third-party settlements. The Court made clear in *Cowart*, however, that "[t]he controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." 505 U.S. at 476. Although recognizing that its application of the plain meaning of the statutory text would likely lead to harsh results for many maritime workers and their families, the Court emphasized that "[i]t is the duty of the courts to enforce the judgment of the Legislature[;] [i]t is Congress that has the authority to change the statute, not the courts." *Id.* at 483-484. The same principles govern here.

In any event, no legislation pursues its purposes at all costs. Because the employer does not owe compensation under the Act at the time of the third-party settlement in cases such as this, Congress reasonably could have concluded that the employer does not have a sufficient stake to be deemed a real party in interest in the settlement. By the same token, interpreting Section 33(g)(1) according to its plain meaning furthers the

countervailing interest in avoiding harsh results for the families of injured workers.

A. The Text Of Section 33(g)(1) Makes Clear That Its Prior Approval Requirement Applies Only To Persons Who Are Entitled To Compensation Under The Act At The Time Of Settlement

1. Section 33 of the LHWCA establishes that a person entitled to compensation may seek recovery of damages from a third party without categorically surrendering his or her rights to compensation under the Act. As discussed more fully above, see pp. 7-8, *supra*, Section 33(a) addresses the situation in which a "person entitled to compensation" under the Act determines that a third party—"some person other than the employer or a person or persons in his employ"—is liable to the person in damages on account of a disability or death for which compensation under the Act is payable. 33 U.S.C. 933(a). Section 33(a) explicitly states that the person entitled to compensation need not elect whether to receive compensation under the Act or to recover against the third party. Instead, Section 33(b) provides that the person may receive compensation under the Act and also pursue an action against the third party, subject to certain limitations. 33 U.S.C. 933(b).

If the person entitled to compensation obtains a recovery from a third party, the employer receives a credit against its statutory liability to the person in the amount of that recovery. 33 U.S.C. 933(f). The employer remains liable only for the amount of LHWCA benefits that is greater than the net third-party recovery. *Ibid.*

If the person entitled to compensation enters into a settlement with a third party, however, and the amount to be recovered is less than the compensation to which the person would be entitled under the LHWCA, the employer does not remain liable for any benefits unless the person

entitled to compensation adheres to certain procedures. Specifically, Section 33(g)(1) explains that the employer "shall be liable for compensation as determined under subsection (f) * * * only if written approval of the settlement is obtained from the employer, and the employer's carrier, before the settlement is executed." 33 U.S.C. 933(g)(1). If prior written approval is not obtained, all the person's rights to compensation and medical benefits under the Act are terminated. 33 U.S.C. 933(g)(2).

By its terms, the prior approval requirement of Section 33(g)(1) of the LHWCA applies only if a "person entitled to compensation * * * enters into a settlement with a third person." 33 U.S.C. 933(g)(1).[8] When the Court interpreted "person entitled to compensation" in *Cowart*, it concluded:

> Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies * * *. It means only that the person satisfies the prerequisites attached to the right. See generally *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972) (discussing property interests protected by the Due Process Clause and contrasting an entitlement to an expectancy); Black's Law Dictionary 532 (6th ed. 1990) (defining "entitle" as "[t]o qualify for; to furnish with proper grounds for seeking or claiming").

505 U.S. at 477. The Court therefore held that a claimant for disability benefits "became a person entitled to compensation at the moment his right to recovery vested," not, for example, when his employer admitted liability.

---

[8] Section 33(g)(1) also applies when the representative of a person entitled to compensation enters into a settlement. That term refers to the legal representative of a deceased employee, 33 U.S.C. 933(c). Petitioner does not contend that respondent Yates was such a representative when she entered into the pre-death settlements.

Ibid.; see *Black's Law Dictionary* 1563 (6th ed. 1990) ("[v]ested" means "[f]ixed; accrued; settled; absolute; complete").

Respondent Yates was not a "person entitled to compensation" within the meaning of Section 33(g)(1) or the Court's reasoning in *Cowart* at the time she joined in the pre-death settlement agreements, for which she did not receive prior employer approval. Like the claimant in *Cowart*, 505 U.S. at 477, respondent Yates became a person entitled to compensation only when her right to recover benefits under the LHWCA vested.

Because respondent Yates seeks death benefits, rather than disability benefits, she did not become entitled to such benefits at the time of her husband's disabling injury. Whether she would become eligible for death benefits under the LHWCA could not have been determined until after the death of her husband, because only then could it be determined whether she met the various statutory prerequisites for eligibility. First, for example, respondent would have to be a survivor at the time of her husband's death; she would never become entitled to death benefits if she predeceased her husband. 33 U.S.C. 909. Second, respondent would have to remain married to her husband at the time of his death; if she and her husband divorced at any time after his injury and before his death, she could not qualify for death benefits. 33 U.S.C. 909(b), 902(16). Third, respondent could not simply remain married to her husband in name only to qualify; at the time of his death, she would have to be living with him, be supported by him, or be living apart as a result of his having deserted her. See 33 U.S.C. 902(16); *Thompson* v. *Lawson*, 347 U.S. 334, 336 (1954) (regardless of whether husband and wife were still legally married, the fact that the wife was living apart from the husband at the time of his death for a reason other than his desertion meant that

she was not a widow within the meaning of the LHWCA, and therefore was not entitled to death benefits). Fourth, when respondent's husband died, it would have to be determined that his death was caused at least in part by the employment-related injury; if her husband died from injuries sustained in some other manner, *e.g.*, in a car accident, respondent could not qualify for death benefits. 33 U.S.C. 909 (death benefits available "[i]f the injury causes death").[9]

Petitioner and its *amici* ignore the clear provisions of the Act and inaccurately suggest that petitioner's eligibility was established, and her right to death benefits vested, at the time of her husband's injury. See Pet. Br. 20-21; Nat'l Ass'n of Waterfront Employers *et al.* Amici Br. 5, 8, 17-19. They cite Section 9(f) of the Act, which provides that "[a]ll questions of dependency shall be determined as of the time of the injury." 33 U.S.C. 909(f). But as pointed out above, dependency at the time of injury is not determinative of entitlement to death benefits where, as here, the person claims benefits as a widow. Indeed, a widow can be eligible for death benefits even if she was not dependent on her husband at the time of his death if she nonetheless lived with him, or lived apart from him for justifiable cause or desertion.

Petitioner is wrong to state (Pet. Br. 21) that respondent Yates' "status as a dependent widow was established as of the time of her husband's injury," and that she therefore was bound by the approval requirement of Section 33(g)(1) from that time forward. The LHWCA could not be clearer regarding who qualifies as a widow for purposes of the Act: " 'widow or widower' includes only the

---

[9] In the instant case, respondent Yates' husband died from prostate cancer, but the parties stipulated that his asbestosis contributed to his death. Pet. App. 3.

decedent's wife or husband living with or dependent for support upon him or her *at the time of his or her death*; or living apart for justifiable cause or by reason of his or her desertion *at such time*." 33 U.S.C. 902(16) (emphasis added). As a result, whether a person is a widow or widower for purposes of the LHWCA cannot be determined prior to the death of the worker. Petitioner's list (Pet. Br. 22) of other facts that are determined at the time of injury under the statutory scheme simply reinforces the fact that Congress did not so provide in the case of determining whether a person is a widow entitled to death benefits.

Moreover, courts "have consistently held that the right to death benefits is separate and distinct from the right to disability benefits and does not arise until death occurs." *Puig* v. *Standard Dredging Corp.*, 599 F.2d 467, 469 (1st Cir. 1979); see also, *e.g.*, *Hampton Roads Stevedoring Corp.* v. *O'Hearne*, 184 F.2d 76, 79 (4th Cir. 1950); *International Mercantile Marine Co.* v. *Lowe*, 93 F.2d 663, 664-665 (2d Cir.), cert. denied, 304 U.S. 565 (1938); 2 Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 64.10 (1996); cf. *Randall* v. *Kreiger*, 90 U.S. (23 Wall.) 137, 148 (1874) (rights of person's heirs and devisees "become fixed and vested" only after person's death). The authorities cited by petitioner (Pet. Br. 21-22) do not support its argument that a right to death benefits vests at the time of injury. In *Pennsylvania Nat'l Mut. Casualty Ins. Co.* v. *Spence*, 591 F.2d 985, 987 (4th Cir.), cert. denied, 444 U.S. 963 (1979), the court recognized that a right of action for death benefits arises only at the time of an employee's death, and merely held that, because the source of liability traces back to the employee's injury, the insurer liable for the injury should also be liable for death benefits. In *Todd Shipyards Corp.* v. *Witthuhn*, 596 F.2d 899, 902 (9th Cir. 1979), as in *Puig*, *Hampton Roads*, and *International Mercantile*, the court rejected reliance on

the time of injury for purposes of determining what law applied. The court held that Congress did not violate due process when it changed eligibility criteria for death benefits, after the employee had sustained an injury but before the employee died, because rights to death benefits first vested at the time of death. *Id.* at 902. Courts have therefore distinguished between when liability is "incurred" and when entitlement to and liability for compensation arises.[10]

Finally, respondent Yates might never have become entitled to death benefits under the Act because Congress could have amended the LHWCA, prior to Mr. Yates' death, to change the conditions for entitlement. In fact, Congress did just that in 1984, although in ways that did not affect respondent Yates. For example, Congress eliminated the compensability of the deaths of workers based solely on the fact that they were permanently totally disabled at the time of death by employment-related conditions. Congress made employment-relatedness of the death itself a prerequisite to the right to death benefits and explicitly made that change applicable to all post-amendment deaths. See Pub. L. No. 98-426, § 9(a), 98 Stat.

---

[10] Petitioner's *amici* assert that the agency's statement during a rulemaking proceeding "negates every aspect of its litigating position." Nat'l Ass'n of Waterfront Employers *et al.* Amici Br. 3; see also *id.* at 25. *Amici* point to a 1986 discussion by the Secretary of Labor of a rule relating to the 1984 amendments to the LHWCA, in which he stated that "coverage of a *death* claim does not turn on when 'death is sustained,'" Pet. Br. 5, 17 (quoting 51 Fed. Reg. 4272 (1986)). *Amici* suggest that this statement is dispositive of when respondent Yates became entitled to benefits under the Act. *Amici* take the statement out of context and disregard the clear statements elsewhere in the same document that "a claim for survivor benefits does not arise until the employee's death," and that, before that time, there is no claim under the Act that can be settled. 51 Fed. Reg. at 4276.

1647. Congress also changed the Act's coverage provisions in 1984, withdrawing coverage from a number of narrowly specified circumstances of maritime employment. *Id.* §§ 2(a), 3(a), 98 Stat. 1639-1640. Congress could also, before a worker's death, add further qualifications to the right to death benefits that would be prerequisites for eligibility for the workers' survivors.

Hence, contrary to petitioner's argument (Pet. Br. 20-22), the mere fact of injury to her husband was insufficient to establish that respondent Yates was entitled to (*i.e.*, had a vested right to) death benefits under the LHWCA. At best, at the time of the pre-death settlements, respondent Yates had an "expectancy" that might or might not materialize.[11]

---

[11] Petitioner appears to contend that respondent Yates must have been entitled to compensation under the Act at the time of her pre-death settlements because, otherwise, she would not have been entitled to those settlements. See Pet. Br. 22 ("To the extent entitlement existed, Mrs. Yates was just as entitled to receive compensation under the LHWCA as she was entitled to recover for her husband's wrongful death when she entered into the unapproved settlements during his lifetime."); see also *id.* at 23 n.7. But, petitioner was not "entitled" to any recovery in a wrongful death action at the time of the pre-death settlements, because her husband was still alive. Respondent Yates released her *potential* wrongful death claims as a condition of the settlement of her husband's claims against certain third parties.

When a third party enters into a settlement, the party makes a calculated decision to settle the overall litigation based on a multitude of factors, many of which may have nothing to do with whether all other settling parties were "entitled" to any recovery. For example, in many settlements, the third party may decide that the cost of litigation would be greater than the price of the settlement or that one plaintiff is so sympathetic that a trial would lead to a large damages judgment even though the plaintiff is not lawfully entitled to such. Here, the third parties obviously were interested in resolving all questions of their liability arising from the injury to Mr. Yates, including any potential wrongful death claims that might (or might not) later

2. Petitioner attempts to avoid the natural, normal reading of Section 33(g)(1) by ignoring the import of the phrase "person entitled to compensation." Petitioner instead focuses on a phrase appearing later in Section 33(g)(1) that provides that the only settlements of Section 33(a) actions that are subject to Section 33(g)(1) are those "for an amount less than the compensation to which the person (or the person's representative) would be entitled under" the LHWCA. Petitioner removes the latter phrase from its context and contends that Section 33(g)(1) is applicable to all persons "who 'would be entitled to compensation' under the LHWCA" in the future. Pet. Br. 7; see also *id.* at 8, 15-16, 20, 28.

Petitioner urges adoption of its "forward looking interpretation" of Section 33(g)(1) because other sections of the LHWCA rely on a forward looking approach. Pet. Br. 16 (33 U.S.C. 902(14) (allowing posthumous children to recover death benefits); 33 U.S.C. 910(f) (awards of death benefits and permanent total disability benefits subject to future adjustments)). But all petitioner proves by its references to other provisions of the Act is that Congress made clear in the LHWCA when it intended for a provision to be "forward looking," and when it did not so intend. The relevant language in Section 33(g)(1) is not "forward looking."

The phrase "person entitled to compensation" identifies the persons who are subject to the Section's written approval requirement. By contrast, the phrase on which petitioner relies—"*would be* entitled"—is contained in the

---

arise. Respondent Yates' release of any such potential claims did not signify a then-present entitlement to recover based on a death that had not occurred. In any event, it would be prejudicial to maritime employers generally to conclude that any potential LHWCA claimant who manages to obtain a third-party settlement is thereby also entitled to the LHWCA benefits he or she claims.

description of the type of settlements by such persons that are subject to the approval requirement: settlements "for an amount less than the compensation to which the person (or the person's representative) would be entitled" under the Act. 33 U.S.C. 933(g)(1); see Pet. Br. 15-17, 20. Under the latter phrase, for example, the amount of the settlement must be compared to the total amount of compensation to which the person "would be" entitled over his or her lifetime, not just the amount that had accrued as of the date of settlement. *Linton* v. *Container Stevedoring Co.*, 28 Ben. Rev. Bd. Serv. (MB) 282, 287-288 (1994). Thus, petitioner correctly points out (Pet. Br. 16) that, when determining whether a settlement is for less than the compensation to which the person "would be entitled" under the LHWCA, the Act requires that the amount of the person's future entitlement also be taken into account. Congress thereby made clear the extent to which it intended Section 33(g)(1) to be "forward looking"—specifically, in calculating the amount of compensation, but not in identifying the persons subject to Section 33(g)(1) in the first place. It is not for the courts to expand the coverage to include other persons as well.

Moreover, the trigger for Section 33(g)(1)'s approval requirement is unambiguously written in the present tense—"If the person entitled to compensation (or the person's representative) enters into a settlement with a third person." 33 U.S.C. 933(g)(1). It thus is clear that, in order for the provision to apply, the person must be "entitled to compensation" at the time he or she "enters into a settlement." Petitioner's construction would require that the present tense of Section 33(g)(1) be changed either to "would be entitled" or to "has entered." Thus, Section 33(g)(1) cannot be read to apply to situations in which a person, like respondent Yates, became entitled to compensation under the Act at some point in time *after* she

entered into a settlement of what was, at the time of settlement, only a potential cause of action against a third party.

3. The Ninth Circuit's decision in *Cretan* v. *Bethlehem Steel Corp.*, 1 F.3d 843 (1993), cert. denied, 114 S. Ct. 2705 (1994), upon which petitioner relies (Pet. Br. 16-17, 19-20), is inconsistent with this Court's decision in *Cowart*. Faced with the same issue presented by the instant case, the Ninth Circuit held that "a claimant's status as a 'person entitled to compensation' need not be fixed at any particular moment." 1 F.3d at 846. The Ninth Circuit recognized that this Court's opinion in *Cowart* contains "language that in isolation appears to support" the interpretation adopted by the court of appeals in the instant case. *Id.* at 847. But the Ninth Circuit found "no reason * * * to assume that the Supreme Court had the present situation in mind when it uttered these dicta," and it declined "to give the Supreme Court's statement a binding effect that there is no reason to believe the Court intended." *Ibid.* As the court below recognized (Pet. App. 10), however, *Cowart*'s reasoning cannot be dismissed as "dicta," because it was essential to the Court's understanding of the term "entitlement."

Petitioner suggests (Pet. Br. 18-21) that the *Cretan* interpretation is consistent with *Cowart*. But, in *Cowart*, the Court was presented with the question whether, in order to be a "person entitled to compensation" at the time of settlement within the meaning of Section 33(g)(1), a person must be receiving compensation (or must have received either an acknowledgment by the employer of entitlement or an adjudication of entitlement). The Court answered that question in the negative, concluding that a person who "qualifies" for compensation at the time of the settlement, regardless of whether the right has been acknowledged or adjudicated, is subject to the prior

approval requirement in Section 33(g). 505 U.S. at 477. In this case, respondent Yates did not "qualif[y]" for compensation under the LHWCA when she released potential wrongful death claims against third parties prior to her husband's death.

Petitioner's argument that Section 33(g)(1) applies equally to a person "who would be entitled to compensation in the future" is inconsistent with the Court's approach in *Cowart* in another respect as well. If petitioner were correct, Section 33(g)(1) would have applied to the claimant in *Cowart* regardless of whether he became a "person entitled to compensation" when he qualified for compensation, or later, when he received the compensation or obtained an acknowledgment or judgment that he would receive it. At either point in time, he would have been a person who "would be" entitled to compensation when his claim was adjudicated. Thus, if petitioner were correct, the Court would never have had to address the question presented in *Cowart*. The *Cowart* Court correctly recognized, however, that "entitlement" status at the time of settlement is the critical factor.

B. Petitioner's Policy Arguments Do Not Alter The Plain Meaning Of The Statutory Text

Because Section 33(g)(1) "speaks with clarity," any "judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Cowart*, 505 U.S. at 475. Petitioner nevertheless urges the Court to read "person entitled to compensation" to mean person who "would be" entitled to compensation, so as to avoid what petitioner perceives to be an unfair result.

1. In *Cowart*, the Court recognized the harsh results that its adherence to the plain meaning of the statutory text would likely have on "significant numbers of injured workers or their families." 505 U.S. at 483. The Court

nonetheless declined to deviate from that interpretation because "Congress ha[d] spoken with great clarity to the precise question raised by [that] case." *Ibid.* The Court emphasized that "[i]t is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. * * * If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts." *Id.* at 483-484. See also *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596, 617 (1981) ("the wisest course [in construing the LHWCA] is to adhere closely to what Congress has written"). The same principles govern the instant case. The Court therefore should adhere to the plain meaning of Section 33(g)(1) and reject petitioner's reliance on general policies that cannot be reconciled with the statutory text in the circumstances of this case.[12]

---

[12] To the extent the Court finds any ambiguity in the statutory text, the Director's construction of Section 33(g) should be adopted because it constitutes a reasonable interpretation of the Act. As the Court recognized in *Cowart*, 505 U.S. at 476, 480-481, the Director had taken the position, until after the court of appeals' decision in that case, that a "person entitled to compensation" under Section 33(g) was a person receiving compensation or acknowledged by the employer to be entitled to it. In light of the ruling by the en banc court of appeals in *Cowart*, however, and further consideration of the 1984 amendments, the Director no longer defended that construction. Since *Cowart*, the Director has consistently interpreted Section 33(g) in the manner adopted in the Fifth Circuit's ruling below.

The Director's reasonable interpretation warrants judicial deference because he represents the agency charged with administering the LHWCA under 33 U.S.C. 939(a) and 20 C.F.R. 701.202(a). See *Cowart*, 505 U.S. at 476 (recognizing deference is generally owed to the Director); *Director, OWCP* v. *General Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992); *Zapata Haynie Corp.* v. *Barnard*, 933 F.2d 256, 258 (4th Cir. 1991); *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1046

2. a. Despite the clear message of *Cowart*, petitioner's central contention is that the Court should read Section 33(g)(1) differently in this case to further the policy interests that underlie that provision. Petitioner argues that adherence to the Fifth Circuit's interpretation of "person entitled to compensation" would defeat Section 33(g)'s purpose of protecting employers' financial resources by permitting employers to obtain credits against their statutory liability based on third-party settlements. See Pet. Br. 7-8, 12, 13, 17, 23, 26-27.[13]

(5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983); see also *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159-160 (1987) (Director's construction of analogous Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, is entitled to deference); cf. *Martin* v. *OSHRC*, 499 U.S. 144, 154 (1991) (deference should be given to Secretary's interpretation of regulation promulgated under Occupational Safety and Health Act of 1970, rather than to interpretation by Occupational Safety and Health Review Commission). But see *Sea-Land Serv., Inc.* v. *Rock*, 953 F.2d 56, 59 (3d Cir. 1992) (neither Board nor Director is entitled to special deference regarding LHWCA); *American Ship Bldg. Co.* v. *Director, OWCP*, 865 F.2d 727, 730 (6th Cir. 1989) (same).

[13] Resolution of the Section 33(g)(1) issue is important not only for cases such as this one, involving tort settlements by potential death-benefits claimants, but also a more numerous group, involving settlements by potential disability claimants. Most cases in the latter category involve individuals with diagnosed but benign or minor occupational diseases (generally related to asbestos exposure) that are not yet disabling, and that therefore do not yet constitute an "injury" for most purposes under the LHWCA. See note 17, *infra*. The Director pointed out in his brief in *Cowart* that, in such cases, "the settlement of a third party claim before the employee becomes disabled may not be subject to the prior approval requirement." 91-17 Fed. Resp. Br. at 36-37 n.29 (citing *Bethlehem Steel Corp.* v. *Mobley*, 920 F.2d 558, 560 (9th Cir. 1990)). Thus, contrary to the assertion of *amici* (see Nat'l Ass'n of Waterfront Employers *et al.* Amici Br. 10), the Director does not apply different interpretations of Section 33(g)(1) to claims for disability benefits under 33 U.S.C. 908 and claims for death benefits under 33 U.S.C. 909.

Petitioner is correct that, as a general matter, Section 33(g)'s written approval requirement serves that employer interest. *Cowart*, 505 U.S. at 482; *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968). Specifically, Section 33(g)(1) protects an employer, which has a statutorily mandated obligation to pay compensation to a person entitled to compensation, from improvident third-party settlements by that person.[14] "But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam); see also *PBGC* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990).

In *Cowart*, this Court observed that, because Section 33(f) provides that a recovery from a third party "reduces the compensation owed by the employer," the employer "is a real party in interest" in any recovery that might reduce or extinguish the employer's liability. 505 U.S. at 482. It

[14] Amicus Bethlehem Steel quotes (Br. 3, 8) the Director's statement in his court of appeals brief in *Cretan* that he agrees with the employer's description of the "general purpose and plan" of Section 33(f) and (g). Bethlehem Steel contends that the Director thereby acknowledged that his post-*Cowart* construction of "person entitled to compensation" would "thwart Congress' plans and purposes." Each time that Bethlehem Steel repeats that passage, however, it fails to include the sentence that immediately followed the quoted material. The Director went on expressly to state in the *Cretan* brief that, "where the plain terms of the statute do not encompass the facts of the case, the argument that the provision *should* extend to those facts is properly cognizable only by Congress." Resp. Director, OWCP, Br. at 29, *Cretan* v. *Bethlehem Steel Corp.*, *supra* (Nos. 90-70589, 90-70634).

therefore is by no means obvious that Section 33(g)(1) should be understood to protect not only an employer that has a legal obligation to the employee at the time of settlement, but also an employer that has no such legal obligation and that may, in fact, never have such an obligation to the person who is settling a claim (or potential claim) against a third party. In the latter situation, because compensation is not "owed by the employer" and the employer therefore has only a *potential* claim to share in the proceeds, Congress reasonably could have concluded that the employer does not have a sufficiently concrete stake to be accorded the status of a "real party in interest" in the settlement. That is especially so in light of the countervailing hardship that the prior approval requirement may work on injured workers or their families, as this Court recognized in *Cowart*, 505 U.S. at 483. In short, the employer's ability to obtain an offset against its statutory liability in the amount of other recoveries received by claimants is not so sacrosanct as petitioner repeatedly claims. If Congress had intended for the employer's offset to be maximized and protected at all costs, it presumably would have assigned the cause of action to the employer without reservation; but Congress did not do so. See 33 U.S.C. 933(a) and (b).

In any event, application of the plain meaning of Section 33(g)(1) does not "eliminate[]" all protection for employers from unreasonable pre-death releases of potential wrongful death claims. Such releases are often made as part of a disabled employee's settlement, and therefore often involve a "person entitled to compensation" (the disabled employee) who must obtain written approval if his part of the settlement is for less than the compensation to which he would be entitled under the Act. Also, if the employer has paid compensation to the employee, as petitioner did to Jefferson Yates (Pet. App. 2), the employer would have a

right to intervene in the employee's suit to protect its judicially-recognized right of subrogation. See, *e.g.*, *The Etna*, 138 F.2d 37, 41-42 (3d Cir. 1943). These circumstances give employers considerable leverage toward ensuring that employees negotiate reasonable settlements.[15] Employers also may persuade third parties to negotiate reasonable settlements by attempting to sue the third parties directly in an independent cause of action. See, *e.g.*, *Pallas Shipping Agency, Ltd.* v. *Duris*, 461 U.S. 529, 538 (1983); *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969); *Crescent Wharf & Warehouse Co.* v. *Barracuda Tanker Corp.*, 696 F.2d 703, 706 (9th Cir. 1983); *Louviere* v. *Shell Oil Co.*, 509 F.2d 278, 282-284, modified on petition for reh'g, 515 F.2d 571 (5th Cir. 1975), cert. denied, 423 U.S. 1078 (1976).

b. Petitioner's policy argument boils down to the contention that the sole purpose of Section 33 is to prevent double recoveries to claimants and that that purpose would be defeated by the Director's interpretation. Pet. Br. 18, 25. The underlying premise of petitioner's argument is that, if a person like respondent Yates is not a "person entitled to compensation" under Section 33(g)(1) when she joins in a pre-death settlement, then the person also is not covered by the offset provision of Section 33(f), which also applies to third-party recoveries by a "person entitled to compensation." Interpreting the phrase in the same manner in the two sections means that an employer would not be entitled to a credit against settlements in cases such as

---

[15] In the 1984 amendments to the LHWCA, Congress further assisted employers by providing a forfeiture of "all rights to compensation and medical benefits under this Act" if "the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person." Pub. L. No. 98-426, § 21(d), 98 Stat. 1652 (enacting 33 U.S.C. 933(g)(2)).

this. Pet. Br. 9, 23-24. Petitioner argues that "such a 'consistent interpretation' would render such settlements totally useless and of no account to employers." Pet. Br. 9.

In one respect, the Director agrees with petitioner. In light of the reasoning of *Cowart*, it appears that the phrase "person entitled to compensation" must be interpreted in the same manner for purposes of both Section 33(f) and Section 33(g)(1). See *Cowart*, 505 U.S. at 479. Thus, Section 33(f) would permit an employer a credit against its statutory liability to a person for a recovery by that person from a third party only if the person was entitled to compensation at the time of the recovery, having instituted proceedings prior to the expiration of six months after acceptance of a compensation award. See 33 U.S.C. 933(f) and (b). That result is contrary to the Director's pre-*Cowart* interpretation. But just as the Director recognized that his interpretation had to be changed with regard to Section 33(g)(1) in light of the construction of that Section by the court of appeals and this Court in *Cowart*, he recognizes that his interpretation of Section 33(f) also must now be consistent with the ruling and reasoning of *Cowart*.[16] The Director's

[16] Before *Cowart*, the Director's interpretation of "person entitled to compensation" depended, in part, on the context in which that phrase was used. Thus, the Director interpreted the phrase differently for purposes of Section 33(f) than he did for purposes of Section 33(g)(1). See note 12, *supra*. With regard to Section 33(f), the Director did not "require the claimant's status as a 'person entitled to compensation' to be determined at any particular time." *Force* v. *Director, OWCP*, 938 F.2d 981, 984-985 (9th Cir. 1991). That interpretation was given deference by the Ninth Circuit in an earlier case. See *ibid.*; *Cretan*, 1 F.3d at 847-848 (discussing Director's prior interpretation of Section 33(f)); see Pet. Br. 25-26 (discussing the *Force* court's deference to the Director's pre-*Cowart* interpretation). After *Cowart*, however, the Director reconsidered his position and changed his interpretation to conform to the statutory construction adopted by this Court. The

former construction of the phrase for purposes of Section 33(f) was based on his view of the underlying policy at stake, not on the literal interpretation of the statutory text, as in *Cowart*. In the Director's view, the principles of statutory construction followed in *Cowart* require that the Director's former construction of Section 33(f) be rejected.

In any event, the Court need not resolve the question whether Section 33(f) applies to the circumstances of this case because that question was not before the court of appeals or the Board. The questions of offset under Section 33(f) that the lower court addressed concerned offsets for settlements into which respondent Yates entered *after* her husband's death (and therefore *after* she was a "person entitled to compensation" under the Act), and for which she obtained prior written approval from petitioner under Section 33(g).

Moreover, if we assume that an employer credit is not available under Section 33(f) in the instant circumstances, that result does not render he statutory scheme irrational. For contrary to petitioner's unstated assumption, "[t]he law contains no rigid rule against overcompensation." *McDermott, Inc.* v. *AmClyde*, 114 S. Ct. 1461, 1470 (1994) (adopting "proportionate share" method of calculating liability of nonsettling defendant in admiralty case). Consistent with that proposition, the LHWCA has been construed to allow double recovery in certain circumstances. Cf. *Brown* v. *Forest Oil Corp.*, 29 F.3d 966,

Cowart Court had expressly criticized the Director's prior practice of having "adopted differing interpretations of the identical language in §§ 33(f) and 33(g)." *Cowart*, 505 U.S. at 479. Therefore, in *Cretan*, the Director argued (unsuccessfully) that Section 33(f) does not provide an employer a credit against its liability for the amount recovered by a person from a third party unless that person comes within the meaning of "person entitled to compensation" as construed in *Cowart*.

971-972 (5th Cir. 1994) (action under Section 5(a) against employer that failed to secure payment of compensation); *Texports Stevedores Co.* v. *Director, OWCP*, 931 F.2d 331, 334 (5th Cir. 1991) (under Section 33, employee may offset reimbursed medical expenses against his third-party recovery, thereby requiring employer to pay a larger amount as deficiency compensation); *Todd Shipyards Corp.* v. *Director, OWCP*, 848 F.2d 125, 128-129 (9th Cir. 1988) (Section 3(e)'s credit for amounts employee receives under other workers' compensation laws does not include veterans disability benefits); *Carter* v. *Director, OWCP*, 751 F.2d 1398, 1404 (D.C. Cir. 1985) (Scalia, J.) (no reduction of liability on the part of special statutory fund on account of third-party recovery, absent express statutory authority). State courts have also recognized that a worker's compensation statute does not have to protect employers against a claimant's possible double recovery from a third party. See *K-Mart Apparel Corp.* v. *Temples*, 401 S.E.2d 5, 7 (Ga. 1991) (state law's failure to provide subrogation against third-party recovery is not fundamentally unfair even though it permits double recovery); *Transcontinental Ins. Co.* v. *Walsh*, 621 S.W.2d 461, 463-464 (Tex. Civ. App. 1981) (construing statute not to allow offset for pre-death settlement because surviving spouse was not a "workmen's compensation beneficiary * * * entitled to compensation" at the time of settlement).

Moreover, although Congress has enacted provisions that reduce an employer's LHWCA liability when persons entitled to compensation receive funds in certain specified circumstances, no credit can be allowed (absent further action by Congress) if the terms of the statutory provision do not cover a particular collateral recovery. See *United Brands Co.* v. *Melson*, 594 F.2d 1068 (5th Cir. 1979) (employer not entitled to credit against its liability for amount worker received from state workers' compensation

settlement with different employer), and Pub. L. No. 98-426, § 3(b), 98 Stat. 1641 (amending LHWCA to grant employers such a credit). In the absence of any such action by Congress here, neither the Director nor the courts have the authority to ignore the plain meaning of the LHWCA in order to foreclose "double recovery"—any more than either could do so, for example, to allow credit to employers for life-insurance proceeds or survivors' pension rights, for which no credit is now allowed.[17]

---

[17] At the time of *Cowart*, the Director noted that difficulties under Section 33(g) could arise in occupational disease cases, where third-party litigation is often complex and costly, and where there are often multiple defendants with limited assets and claimants who frequently settle for relatively small amounts. 91-17 Fed. Resp. Br. at 35. The Director did not believe that those concerns justified a departure from the plain language of Section 33(g) in *Cowart*, in part because of some limitations inhering in that Section—including that a settlement of a third-party claim before an employee becomes disabled may not be subject to the prior approval requirement. 91-17 Fed. Resp. Br. at 36 & n.29. The Director also believed that difficulties for occupational disease claimants were balanced by certain features of the 1984 amendments to the LHWCA that made it easier for such claimants to recover LHWCA benefits. *Id.* at 37.

After *Cowart*, some employers, including petitioner, have urged that *Cowart* be interpreted to eliminate their existing liabilities—and potential, future liabilities—for thousands of occupational disease claims, contrary to the Director's view that at least some such claims should not even be adjudicated. See *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 81 F.3d 561 (5th Cir. 1996); *Ingalls Shipbuilding, Inc.* v. *Asbestos Health Claimants*, 17 F.3d 130, 135-136 (5th Cir. 1994). Those attempts are inconsistent with the Director's view, expressed in *Cowart*, concerning restrictions that still apply to Section 33(g), and they could defeat Congress's attempt, through the 1984 LHWCA amendments, to assist occupational disease claimants. Among other things, the 1984 amendments redefined the meaning of "injury" and extended the time for pending cases, as well as for other cases, in which an employee with an occupational disease has to give notice of injury and file for compensation under the LHWCA. See Pub. L.

II. THE DIRECTOR OF THE OFFICE OF WORKERS' COMPENSATION PROGRAMS IS ENTITLED TO PARTICIPATE AS A PARTY RESPONDENT IN THE COURT OF APPEALS WHEN A PRIVATE PARTY SEEKS REVIEW OF A DECISION OF THE BENEFITS REVIEW BOARD

A. In *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278 (1995), this Court held that Section 21(c) of the LHWCA, 33 U.S.C. 921(c), does not grant the Director of the Office of Workers' Compensation Programs a right to petition a court of appeals to review decisions of the Benefits Review Board in cases in which the Director's claim to standing relies "solely upon the mere existence and impairment of [the Director's] governmental interest" as administrator of the LHWCA. 115 S. Ct. at 1285. The Court concluded that, when that is the Director's only interest, the Director is not a person "adversely affected or aggrieved" by the Board order, within the meaning of Section 21(c). *Id.* at 1284-1285. The Court expressly reserved judgment on certain other issues concerning the Director's participation in court of appeals' reviews of Board decisions under Section 21(c). Thus, the Court indicated that the Director may have standing to seek review in limited circumstances where the Board's ruling interferes with a specific statutory duty of the Director, such as the Director's duties in administering the special statutory

---

No. 98-426, §§ 11(a), 12, 28(a) and (g), 98 Stat. 1648, 1649, 1655. If Section 33(g) applies as expansively as petitioner argues, then those provisions could be meaningless for most claimants, who either have entered or can be expected to enter into settlements in asbestos litigation. But see *Georgine* v. *Amchem Prods., Inc.*, 157 F.R.D. 246, 332-333 (E.D. Pa. 1994) (concluding that Section 33(g) did not apply to nationwide class action asbestos settlement), vacated on other grounds, 83 F.3d 610 (3d Cir. 1996).

fund established by Section 44(a) of the Act, 33 U.S.C. 944(a), that assumes liability for compensation payments in particular cases under Section 8(f) of the Act, 33 U.S.C. 908(f). See *Newport News*, 115 S. Ct. at 1282 n.1 (reserving question). The Court also expressly declined to decide "whether the Director (rather than the Benefits Review Board) is the proper party respondent to an appeal from the Board's determination." *Id.* at 1284 n.2.

Petitioner now contends (Pet. Br. 10) that the Director must meet the same Article III standing requirements as a party litigant to appear as a respondent in the court of appeals. A plaintiff (or a petitioner in the court of appeals under the LHWCA) must establish standing to satisfy the "case or controversy" requirement of Article III of the United States Constitution and (subject to abrogation by Congress) certain prudential limitations as well. See, *e.g.*, *United Food & Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 116 S. Ct. 1529, 1533-1534 (1996). Once a plaintiff or petitioner establishes standing, however, different considerations normally determine who else may be a party to the case. For example, in this Court, "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court," and are considered respondents, unless they have no interest in the outcome of the certiorari petition. Sup. Ct. R. 12.6. By analogy, the Director, as a party before the Board, 20 C.F.R. 801.2(a)(10), 801.102(a), should be considered a party respondent entitled to file documents in court of appeals proceedings to review Board orders.

The Director's entitlement to appear as a party respondent in the court of appeals in cases being reviewed under Section 21(c) is not contingent on his meeting Article III standing requirements because, by definition, cases reviewed by a court of appeals under Section 21(c) on

the petition of a claimant or an employer already satisfy Article III's case-or-controversy requirement due to the petitioning party's concrete stake in the outcome and the adverse interest of the other private party. In *Newport News*, the Court expressly recognized that an agency's entitlement to participate in the court of appeals as a party respondent is distinct from whether the agency has standing to appeal, observing that, "[o]bviously, an agency's entitlement to party respondent status does not necessarily imply that agency's standing to appeal." 115 S. Ct. at 1284 n.2. Moreover, Section 21(c)'s statutory requirement that a petitioner be "adversely affected or aggrieved" by the Board's ruling does not apply to respondents, who necessarily include parties who prevailed before the Board. The party-respondent question thus is not one of "standing." Standing concerns the right of a litigant to initiate proceedings, while the party-respondent question concerns the Director's right to participate in proceedings that another litigant has already initiated in court.

B. 1. Petitioner's contention (Pet. Br. 33) that there is no authority for the Director to appear as a party respondent in the court of appeals disregards at least two sources of such authority—Section 21a of the LHWCA, 33 U.S.C. 921a, and Rule 15(a) of the Federal Rules of Appellate Procedure. Section 21a states:

> Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

33 U.S.C. 921a. Clearly, Congress intended that the various entities within the agency at issue here (the Department of Labor) could, in certain circumstances, participate

in "court proceedings under section 921," inasmuch as Congress provided for their legal representation in such cases. Section 921a refers explicitly to the Secretary. As the Secretary's delegate for purposes of the Act, the Director stands in the Secretary's shoes, and the Secretary has specified that the Director, as his delegate, is to be the agency official represented in court in connection with petitions for review under Section 21(c). Moreover, although the LHWCA does not specify who is to appear as a respondent on a petition for review, Section 21(c), 33 U.S.C. 921(c), provides that, upon the filing of the petition for review, notice is to be provided to the Board and to the "other parties," a term that includes the Director, who was a party before the Board. See *McCord* v. *Benefits Review Bd.*, 514 F.2d 198, 200 (D.C. Cir. 1975).

To be sure, Section 21a could be read to be limited to instances in which the Secretary, through the Director, has standing under Section 21(c) to petition for review, *e.g.* where the Director is adversely affected or aggrieved because the Board's ruling interferes with the Director's duties in administering the special fund under 33 U.S.C. 944(a). But there is no reason to believe that the participation in litigation contemplated by Section 21a is limited to those narrow circumstances.[18]

2. Even absent Section 21a, however, there is clear legal authority for the Director to participate as a party respondent when a court of appeals reviews a ruling by the Board. As petitioner acknowledges, Federal Rule of

---

[18] If the Director never has standing to seek judicial review, as petitioner seems to suggest (Pet. Br. 32, 39 (contending Director is not a "person" within the meaning of Section 21(c); but see *Newport News*, 115 S. Ct. at 1284 n.3 (leaving that issue unresolved)), Section 21a would seem necessarily to be based on an understanding by Congress that the Director is authorized to appear as a respondent.

Appellate Procedure 15(a) requires that, "[i]n each case" in which review by the court of appeals of an agency order is sought, "the agency must be named respondent." See Pet. Br. 34-36.[19]

Rule 15(a) defines "agency" to "include[] agency, board, commission, or officer." Fed. R. App. P. 15(a). Rule 15(a) has required that the agency be named as respondent since 1966. See Notes of Advisory Committee on Appellate Rules 1967 Adoption. Before 1966, the courts of appeals provided for agency participation through local rules. See 9 James W. Moore, *Moore's Federal Practice* ¶ 215.01 (1996) (quoting text of so-called uniform rule of Third Circuit); 3 Kenneth C. Davis, *Administrative Law Treatise* 283 n.23 (1958) ("Every volume of reports of federal decisions contains cases in which federal agencies are parties, and no one ever challenges the propriety of this practice.").

---

[19] Petitioner argues that Rule 15(a) does not apply because the Director's presence as a party is not necessary "to insure the proper adversarial clash requisite to a 'case or controversy.'" Pet. Br. 35 (citation omitted). But Rule 15(a) on its face imposes no such limitation, and "[t]he existence of sufficient adversity between private parties has not been thought to preclude the Government's right to be a party in many other sorts of review of federal administrative action." *Pittston Steredoring Corp.* v. *Dellaventura*, 544 F.2d 35, 43 n.5 (2d Cir. 1976), aff'd on other grounds *sub nom. Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977); see, *e.g.*, *North Dakota ex rel. Lemke* v. *Chicago & N.W. Ry.*, 257 U.S. 485, 490 (1922) (provision for United States to participate in proceedings to review orders of Interstate Commerce Commission). Sufficient adversity between private parties of course does establish a case or controversy under the LHWCA, see *Director, OWCP* v. *Perini North River Assocs.*, 459 U.S. 297, 305 (1983), and thereby defeats petitioner's argument (Pet. Br. 38) that allowing the Director's participation under Rule 15(a) would extend an appellate court's jurisdiction contrary to Federal Rule of Appellate Procedure 1(b).

Before 1972, a deputy commissioner was a party in the court of appeals when the agency's determination of a compensation case was under review. That was because Congress provided that a deputy commissioner be the respondent in any district court proceedings challenging the agency's determination of a compensation claim under the LHWCA. 33 U.S.C. 921(b) (1970). The deputy commissioner was subject to appointment and oversight by the Secretary. 33 U.S.C. 939(a) and (b), 940(a) and (b); see also 20 C.F.R. 31.1 (1971). Thus, an action in the district court against a deputy commissioner was effectively an action against the Secretary of Labor.[20] An appeal in such a case was taken to the court of appeals, where the deputy commissioner necessarily continued as a party.

In the 1972 amendments to the LHWCA, Congress assigned adjudicatory responsibilities to administrative law judges and created the Benefits Review Board to perform the review function formerly assigned to district courts. At the same time, Congress authorized the Secretary to appoint the members of the Board to serve at his discretion, 33 U.S.C. 921(b); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 12 (1972); S. Rep. No. 1125, 92d Cong., 2d Sess. 14-15 (1972); see also *Kalaris* v. *Donovan*, 697 F.2d 376, 391-397 (D.C. Cir.) (Secretary has authority to remove Board members), cert. denied, 462 U.S. 1119 (1983), and retained the Secretary's authority to appoint employees and

---

[20] The judicial proceeding under that version of the Act constituted a suit for injunctive relief against the deputy commissioner in district court, with further review by appeal to a court of appeals under 28 U.S.C. 1291. See 33 U.S.C. 921(b) (1970); *Kalaris* v. *Donovan*, 697 F.2d 376, 382 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983). At that time, the deputy commissioners in the Department of Labor both administered the LHWCA and adjudicated cases. See 33 U.S.C. 919 (1970); *Kalaris*, 697 F.2d at 381-382.

administer the LHWCA, see 33 U.S.C. 939(a) and (b), 940(a) and (b).

In adopting this new arrangement in 1972, Congress did not specifically denominate who would be a respondent in court proceedings to review Board decisions in the court of appeals, under Rule 15(a). The 1972 amendments evidenced no intent, however, to change the pre-1972 rule allowing the Secretary to participate, through the deputy commissioner acting (in part) as the administrator of the Act, as a respondent in court proceedings to review final administrative orders awarding or denying compensation. See *Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479, 485 (D.C. Cir. 1982); *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35, 43 n.5 (2d Cir. 1976), aff'd on other grounds *sub nom. Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977).

Although petitioner argues (Pet. Br. 37) that the purpose of the 1972 amendments was "to remove the Director from the adjudicative process," it misapplies that principle to this case. Congress sought to separate the administrative and adjudicative functions within the Department of Labor by ensuring that those functions would be performed by separate officials. Thus, ALJs and members of the Board, not the Director, serve as the administrative *judges* who render formal adjudicatory decisions under the Act. Nothing in that arrangement suggests that the administrator (the Secretary, through the Director) could not participate as a *party* before the Board—much less that the Director could not participate as a party-respondent in the court of appeals in Section 21(c) review proceedings. See S. Rep. No. 1125, *supra*, at 15; H.R. Rep. No. 1441, *supra*, at 11, 12-13. See *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d at 42 n.5 (Friendly, J.) ("we cannot subscribe to the view that Congress intended to create what to us would seem a novel form of review of

federal administrative action in which no one representing the Government would be a party").

Nor did the 1972 amendments demonstrate an intent to require the Board to be named as respondent in proceedings before the courts of appeals. Instead, they gave the Secretary the authority (formerly held by United States Attorneys) to appoint attorneys to represent "the Secretary, the deputy commissioner, or the Board in any court proceedings under section 21 or other provisions of this Act except for proceedings in the Supreme Court of the United States." Pub. L. No. 92-576, § 16, 86 Stat. 1262 (amending 33 U.S.C. 921a); see H.R. Rep. No. 1441, *supra*, at 21-22; S. Rep. No. 1125, *supra*, at 25. See *Ingalls Shipbuilding Div., Litton Sys., Inc.* v. *White*, 681 F.2d 275, 284 (5th Cir. 1982) (suggesting that the omission of a reference to the proper respondent when Section 21 was amended "was a conscious recognition of the more general reference in Rule 15(a)"), overruled in part on other grounds, *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399 (5th Cir.), cert. denied, 469 U.S. 818 (1984); *Krolick Contracting Corp.* v. *Benefits Review Bd.*, 558 F.2d 685, 689-690 (3d Cir. 1977) (same); see also *Newport News*, 115 S. Ct. at 1290 (Ginsburg, J., concurring) (observing that committee report accompanying amendments to the Black Lung Benefits Act "strongly indicates that Congress considered vital to sound administration of the [LHWCA] the administrator's access to court review").

Pursuant to that authority in Section 21a, and his authority to delegate his duties under the Act, the Secretary of Labor has long provided that the Director "shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA," and is to be represented by attorneys from the Department of Labor,

Office of the Solicitor. 20 C.F.R. 802.410(b); see 42 Fed. Reg. 16,133 (1977) (regulation clarifies who represents "the Department of Labor" in Section 21(c) review proceedings). Thus, the Director has a right to participate as a party respondent because the Secretary of Labor has appropriately designated him as the proper agency respondent under Rule 15(a). The majority of the courts of appeals agree. See, *e.g.*, *Goldsmith* v. *Director, OWCP*, 838 F.2d 1079, 1080 (9th Cir. 1988); *White*, 681 F.2d at 281-284; see also *Simpson* v. *Director, OWCP*, 681 F.2d 81, 82 (1st Cir. 1982), cert. denied, 459 U.S. 1127 (1983); *Insurance Co. of North America* v. *Gee*, 702 F.2d 411, 413 n.2 (2d Cir. 1983); cf. *Curtis* v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 807 n.4 (3d Cir. 1988).

There can be little doubt that the Secretary reasonably identified the Director rather than the Board to represent the Department of Labor as respondent in court of appeals proceedings to review Board decisions. As discussed above, the Secretary has delegated his authority to administer and enforce the LHWCA, and other compensation statutes, to the Director. The Director is accountable for the statute's operation and has broad practical experience of its day-to-day administration in many times the number of cases that are litigated formally. The Director therefore bears a responsibility of ensuring fair and consistent operation of the LHWCA. *White*, 681 F.2d at 284. Moreover, because it is the statutory and regulatory interpretations by the Director, rather than those by the Board, that are entitled to deference by the courts (see note 12, *supra*), it is appropriate for the Director rather than the Board to defend his authoritative positions in the courts. See, *e.g.*, *Cowart*, 505 U.S. at 476-477, 479-481.

In contrast, the Board is solely an adjudicatory body that has no more interest in defending its decisions than

did the district courts that the Board replaced in the LHWCA scheme of review. See *Shahady*, 673 F.2d at 485 n.9 and cases cited; *McCord* v. *Benefits Review Bd.*, 514 F.2d 198, 200 (D.C. Cir. 1975); see also *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) ("the Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts"). Requiring the Board to participate in Section 21(c) reviews as respondent would be inconsistent with the adjudicatory role specified for it under the 1972 amendments, and would burden the Board's time and resources, possibly adding to what historically has been a sizeable case backlog. See, *e.g.*, *McCord*, 514 F.2d at 200 (granting motion to dismiss Board as respondent); H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 34 (1984) (noting Board's backlog); see also *Shahady*, 673 F.2d at 483 n.5 ("The Secretary's regulation is the only sensible construction of the current § 921a in light of this and other courts' holdings that the Board (and a fortiori the deputy commissioner) is an improper respondent.").[21]

This Court indicated some approval of the Secretary's regulation naming the Director rather than the Board as respondent in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977). The court of appeals in that case had questioned whether the Director was a proper respondent but had not decided whether the Board should have been substituted for the Director. *Id.* at 256 n.11 (citing

---

[21] To the extent that the Secretary is to be distinguished from the Board for these purposes, Section 39(a) of the LHWCA provides that, "[e]xcept as otherwise specifically provided," the Secretary of Labor shall administer the provisions of the Act. 33 U.S.C. 939(a). Nothing in the Act "specifically provide[s]" for the Board to appear as a respondent in the courts of appeals, and it is therefore within the authority of the Secretary to designate the proper respondent.

Dellaventura, 544 F.2d at 42 n.5). The Court also did not decide that issue, because no party had questioned the identity of the federal respondent. *Ibid.*; see also *Director, OWCP* v. *Perini North River Assocs.*, 459 U.S. 297, 304 n.13 (1983) (open question whether Director is proper party respondent). The Court in *Northeast Marine Terminal* noted, however, that the Secretary's regulation (promulgated after the court of appeals' decision and in response to it, see 42 Fed. Reg. 16,133 (1977)), had "ma[de] it clear that the Director of OWCP is the proper federal party in a case of this nature." 432 U.S. at 256 n.11; accord *Perini North River Assocs.*, 459 U.S. at 304 n.13. By finding the regulation "clear," the Court "appears to have approved [it]." *Shahady*, 673 F.2d at 481.[22]

---

[22] The Secretary's regulation is also consistent with the practice of other agencies that have internal tribunals established solely to adjudicate cases. For example, although the Board of Immigration Appeals renders adjudicatory decisions under the Immigration and Nationality Act, see 8 C.F.R. 3.1 (establishment of Board), the Immigration and Naturalization Service normally constitutes the "agency" respondent on petitions for review in the courts of appeals. See, *e.g.*, *Stone* v. *INS*, 115 S. Ct. 1537 (1995). Similarly, an Appeals Council issues final decisions under the Social Security Act, see 20 C.F.R. 404.981, but district court actions are brought against the Commissioner of Social Security (formerly the Secretary of Health and Human Services). See 42 U.S.C. 405(g); 20 C.F.R. 422.210(d). See also 28 U.S.C. 2341(3)(D) (defining "agency" to mean Secretary for orders issued under Section 812 of Fair Housing Act); 42 U.S.C. 3612(h) (Section 812(h) of Fair Housing Act, providing that ALJ orders are final if Secretary decides not to review them); *Radin* v. *United States*, 699 F.2d 681, 686 (4th Cir. 1983) (National Railroad Adjustment Board and its components are not proper parties in action to challenge award under Railway Labor Act, 45 U.S.C. 153). Even where Congress has established an independent agency to adjudicate disputes (unlike the Benefits Review Board, which is within the Department of Labor, consists of members appointed by the Secretary, and operates under procedures promulgated by the Secretary), most (but not all) courts have held that the adjudicatory tribunal is not a proper party on appeal. See *Oil, Chem. & Atomic Workers Int'l Union* v. *OSHRC*, 671 F.2d 643, 651-652 (D.C. Cir.), cert. denied, 459 U.S. 905 (1982), and cases cited.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General

J. DAVITT MCATEER
Acting Solicitor of Labor
ALLEN H. FELDMAN
Deputy Solicitor General
EDWARD D. SIEGER
Attorney
Department of Labor

AUGUST 1996

APPENDIX

Section 33 of the Longshore and Harbor Workers' Compensation Act, as amended and codified at 33 U.S.C. 933, provides:

§ 933. Compensation for injuries where third persons are liable

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of compensation operating as assignment

Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

(c) Payment into section 944 fund operating as assignment

The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Institution of proceedings or compromise by assignee

Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Recoveries by assignee

Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed

and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) Institution of proceedings by person entitled to compensation

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

(g) Compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is

executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

(3) Any payments by the special fund established under section 944 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment rendered against a third person referred to under subsection (a) of this section. Notwithstanding any other provision of law, such lien shall be enforceable against such proceeds, regardless of whether the Secretary on behalf of the special fund has agreed to or has received actual notice of the settlement or judgment.

(4) Any payments by a trust fund described in section 917 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment recorded against a third person referred to under subsection (a) of this section. Such lien shall have priority over a lien under paragraph (3) of this subsection.

(h) Subrogation

Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) Right to compensation as exclusive remedy

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer.